

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6156
77-6157

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6156
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BROOKHAVEN CABLE TV INC., CAPITOL CABLEVISION INC., SAMSON
CABLEVISION CORP., WARNER CABLE OF OLEAN, INC., NATIONAL CABLE
TELEVISION ASSOCIATION, INC., NEW YORK STATE CABLE TELEVISION
ASSOCIATION, & HOME BOX OFFICE, INC., & TELEPROMPTER ELECTRONICS
CORPORATION,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA & FEDERAL COMMUNICATIONS COMMISSION,

Intervenors-Plaintiffs-
Appellees,

- against -

ROBERT F. KELLY, Chairman; JERRY A. DANZIG, Vice Chairman;
MICHAEL H. PENDERGAST; ELI WAGNER; & EDWARD J. WEGMAN, Commis-
sioners of the NEW YORK STATE COMMISSION ON CABLE TELEVISION,

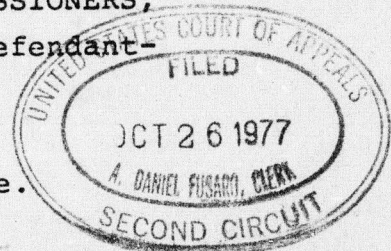
Defendants-Appellants,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Intervenor-Defendant-
Appellant,

CITY OF NEW YORK,

Amicus Curiae.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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MICHAEL H. PENDERGAST, ELI WAGNER AND EDWARD J. WEGMAN, COM-
MISSIONERS OF THE NEW YORK STATE COMMISSION ON CABLE TELEVISION

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STATE COMMISSION ON CABLE TELEVISION

PRELIMINARY STATEMENT

Plaintiffs-appellees have commenced an action seeking a judgment (a) declaring that the attempt of defendants-appellants, New York State Commission on Cable Television, to regulate pay cable rates is illegal and void; (b) enjoining defendants-appellants from regulating or attempting to regulate pay cable rates; and (c) granting to plaintiffs-appellees such other and further relief as is just.

These are appeals by defendants, Commissioners of the New York State Commission on Cable Television, and by intervenor-defendant, National Association of Regulatory Commissioners, from a judgment (J.A. 5-7)* signed by Honorable Edmund Port, Senior United States District Judge for the Northern District of New York, dated May 11, 1977 and filed in the Clerk's office on May 12, 1977. The judgment granted summary judgment to plaintiffs on the first cause of action set forth in the complaint (J.A. 9-20), declared that intervenor-plaintiff Federal Communications Commission (hereinafter FCC) had preempted the regulation of rates charged for pay cable television, and enjoined the New York State Commission on Cable Television from regulating pay cable rates or requiring cable television companies to specify pay cable rates in franchises granted by municipalities within the State of New York.

ISSUES PRESENTED

1. Does the FCC have the authority, under the Communications Act of 1934 (47 U.S.C.) to preempt the states from regulating

*References in parentheses preceded by "J.A." refer to Joint Appendix.

the rates charged for pay cable television, a non-broadcast medium?

2. Is regulation of pay cable rates reasonably ancillary to the FCC's responsibility to regulate over the air broadcasting?

3. Does defendants' "Clarification of Commission Policy", which is challenged by this action, conflict with any formal regulation which has been promulgated by the FCC?

DECISION BELOW

The District Court, in granting plaintiffs' motion for summary judgment on the first claim in the complaint, citing U. S. v. Southwestern Cable Co., 392 U. S. 157, 178 (1968), held that jurisdiction over pay cable rates is reasonably ancillary to the effective performance of the responsibilities of the FCC for the regulation of over the air broadcasting (J.A. 150-173). The District Court further held (J.A. 159) that the authority of the FCC to regulate cable TV is contained in the general language and purpose of the Communications Act of 1934 (47 U.S.C. 9151, 152[a]) which was upheld by the Supreme Court in United States v. Southwestern Cable Co., 392 U. S. 157 (1968), and United States v. Midwest Video Corp., 406 U. S. 649 (1972). Finally, the Court concluded (J.A. 162) that the FCC had a rational basis for preempting the area of rate regulation of pay cable and for prohibiting state or local regulation of pay cable rates.

STATEMENT OF THE CASE

A. INTRODUCTION

"Cable television" is a means of transmitting or delivering signals by wire or cable from an origination point to a receiving terminal, i.e., the subscriber's television set. The services that may be provided by cable television are virtually limitless and include the retransmission of over the air radio and television broadcast signals, the transmission of locally originated video programming, computer data and a variety of other information and programming. At the present time, the majority of cable television companies in the State of New York provide a service package for a fixed amount which includes local and distant television and radio broadcast signals and, in certain cases, various channels dedicated to use by the local government, the local school district and the public generally. In addition to the above service package, many cable television companies in the State provide non-broadcast programming or services for an additional per program or per channel charge. Such programming is generally referred to as "pay cable" or "premium programming". However, regardless of the type of services provided, it is the mode of transmission which makes cable television a distinctive communications medium and establishes the basis for State jurisdiction.

B. REGULATION OF CABLE TELEVISION IN NEW YORK STATE

Article 28 of the Executive Law, enacted as Chapter 466 of the Laws of 1972, provides for the comprehensive regulation of cable television companies operating in New York State and establishes

an agency within the Executive Department, known as the Commission on Cable Television. The Commission is charged with the responsibility of administering the provisions of Article 28. In the declaration of legislative findings and intent, the Legislature (Executive Law, § 811) "...determined that while cable television serves in part as an extension of interstate broadcasting, operations involve public rights-of-way, municipal franchising, and vital business and community service, and, therefore, are of state concern...." (Emphasis added.)

This finding demonstrates the fact that even though a cable television system provides broadcast signals and other services which are interstate in nature, the cable television system itself, by virtue of the cable which is installed on, over, or under the public right-of-way of a particular community, is essentially local in nature. It is precisely because a cable television system traverses public rights-of-way that a franchise is required prior to construction and operation. Indeed, the FCC has acknowledged the essentially local nature of cable television by promulgating franchise standards in its regulations (47 CFR, § 76.31). These standards are to be included in franchises entered into between cable operators and the municipalities in which they operate.

It is well established that the power to award a franchise resides with the states (Russell v. Sebastian, 233 U. S. 195 [1914]; City of Queensboro v. Cumberland Tel. & Tel. Co., 230 U. S. 58, 65 [1913]; People ex rel. Metropolitan Street Ry. Co. v. State Bd. of Tax Commissioners, 174 N. Y. 417, 435-36 [1903]). In New York State, the power to award a franchise has been delegated to municipalities, with this delegation being specifically recognized in the Executive Law, § 819(1), which provides, "...no cable television system...may

commence or expand the area it serves...unless it has been franchised by each municipality in which it proposed to provide or extend service".

While the municipality remains the primary franchising authority in the State of New York, Executive Law, Article 28, confers upon the New York State Cable Television Commission various duties and responsibilities concerning the franchising process and the content of franchise agreements (Executive Law, § 815). For example, § 815(2)(a) provides that the Commission shall "prescribe standards for procedures and practices which the municipality shall follow in granting franchises,..." and § 815(2)(b) provides that the Commission shall "prescribe minimum standards for inclusion in franchises...." Rates for cable television service are required to be specified in the franchise not because of a discretionary act of the Commission, but by mandate contained in Executive Law, § 825. Section 825(1) provides that "...the rates charged by a cable television company shall be those specified in the franchise which may establish, or provide for the establishment of reasonable classifications of service and categories of subscribers, or charge different rates for differing services or for subscribers in different categories". Section 825(2) provides, "Such rates may not be changed except by amendment of the franchise". The requirement that the rates charged by a cable company be specified in the franchise awarded by the municipality is specific and there is no exemption for any service now provided or which may hereafter be provided by a cable television company.

The fact that the rates for cable television services be set forth in the franchise does not mean that these rates are regulated by the State of New York. In fact, the franchise awarded by a municipality is a contract between the municipality and the cable television operator. The power of a municipality to negotiate and agree to rates by contract is separate and distinct from the power of a municipality to regulate rates by legislation. (See Public Service Commission v. Westchester Street Ry. Co., 206 N. Y. 209 [1912]; City of New York v. Maltbie, 274 N. Y. 90 [1937].)

In the instant case, the plaintiffs-appellees who operate cable television systems have all contracted with the respective municipalities in which they operate. These contracts (the franchises) include the rates which plaintiffs-appellees charge for cable television service, but, as previously indicated, these rates are negotiated between the municipalities and the cable operators (Executive Law, § 825[2], [3]). The exercise of the inherent power of states and municipalities to contract for services to be provided to its citizens has not been preempted.

C. FACTS

On March 1, 1976, the defendants-appellants, acting in their official capacities, issued a Clarification of Commission Policy in Docket No. 90010 (hereinafter referred to as the Clarification) (J.A. 68-74). The pertinent portion of the Clarification provides (J.A. 74):

"1. All subscriber rates imposed by cable television companies in New York

must be authorized by the local franchise held by such companies, as required by Section 825 of the Executive Law.

"2. No change in subscriber rates may be adopted without an appropriate amendment of the governing franchise.

"3. Any such franchise amendment must be approved by this Commission before it may be effective, as provided in Section 822 of the Executive Law.

"4. No exclusion or exemption from the above is provided by State law for rates for any 'pay', 'auxiliary' or 'subscription' cable service.

"5. Cable television companies that have already established 'pay cable' services without following the appropriate legal requirements, as described above, will not be required at this time to make immediate efforts to amend their respective franchises. Such companies must however, file a formal notice with their respective municipalities and this Commission, within the next two months, describing the nature of their 'pay cable' services and the rates currently charged to subscribers for such services. Those cable television companies providing 'pay cable' services and not so on record with their respective municipalities and this Commission by April 30, 1976, will face appropriate sanctions.

"6. Active enforcement of these policies will be undertaken.

"It should be noted that concern has been expressed regarding the effect of the above policies on various special aspects of the 'pay cable' market. At this time the market is, by and large, limited to per-channel specialty services providing a standard variety of home entertainment programming (generally represented by the monthly packages provided by Home Box Office). We will remain open to applications for any appropriate modification of our policies, as expressed above, should the development of particular variations of 'pay cable' services indicate such modifications."

D. THE PARTIES

This action has been commenced by five (5) cable television system operators, two (2) trade associations and Home Box Office, Inc., a supplier of non-broadcast programming services to cable television companies.

In the District Court, the United States and the FCC were granted leave to intervene as parties plaintiff. The National Association of Regulatory Utility Commissioners was granted leave to intervene as a party defendant and the City of New York was granted leave to appear as amicus curiae in support of defendants-appellants' motion for summary judgment.

E. THE COMPLAINT

The litigation, which challenges the Clarification issued by defendants-appellants, alleges four (4) causes of action.

The first cause of action alleges that the FCC has preempted the states from regulating pay cable rates and seeks a judgment declaring the Clarification to be a violation of the Supremacy Clause of the United States Constitution (Art. VI, cl. 2) and the Communications Act of 1934 (47 U.S.C., § 151 et seq.).

The second cause of action seeks a judgment declaring that the Clarification burdens interstate commerce and violates the Commerce Clause of the United States Constitution (Art. I, § 18, cl. 3).

The third cause of action alleges that the regulation of pay cable rates violates the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution since the State of New York does not regulate the rates of advertiser supported television, over-the-air pay television and other forms of entertainment.

The fourth cause of action alleges that the Clarification violates the free speech provisions contained in the First Amendment of the United States Constitution.

F. THE PROCEEDINGS TO DATE

Pursuant to Federal Rules of Civil Procedure, Rule 56, plaintiffs-appellees moved for summary judgment on the first cause of action. The United States of America and the FCC, intervenors-plaintiffs-appellees, also moved for summary judgment on the first cause of action.

Defendants-appellants, pursuant to Federal Rules of Civil Procedure, Rule 56, cross-moved for summary judgment seeking a declaration that the Clarification does not violate the Supremacy Clause of the United States Constitution. National Association of Regulatory Utility Commissioners, intervenor-defendant-appellant, joined in defendants-appellants' cross-motion for summary judgment.

The District Court, in a decision dated March 9, 1977 granted plaintiffs-appellees' motion for summary judgment on the first cause of action in the complaint. In view of that decision and the judgment entered thereon, the issues raised in the remainder of the complaint are moot since the District Court decision declared the Clarification to be invalid.

ARGUMENTPOINT I

THE FCC HAS NEITHER THE STATUTORY NOR
THE CONSTITUTIONAL AUTHORITY TO PREEMPT
STATE REGULATION OF PAY CABLE RATES.

A. THE LIMITS OF STATUTORY AUTHORITY.

The fact that Congress has acted in a particular area does not, of necessity, preempt the states from acting in that same area. Reid v. Colorado, 187 U. S. 137 (1902); Ashell v. Kansas, 209 U. S. 251 (1903); Welch Co. v. New Hampshire, 306 U. S. 79 (1939); Maurer v. Hamilton, 309 U. S. 598 (1940); Huron Portland Cement Co. v. Detroit, 362 U. S. 440 (1960).

In Savage v. Jones, 225 U. S. 501 (1912), the Supreme Court held (at page 533):

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

Furthermore, preemption is not to be inferred from congressional action without a specific legislative declaration of federal supremacy. As stated by the Supreme Court in Schwartz v. Texas, 344 U. S. 199 (1952) (at page 202-203):

"If Congress is authorized to act in a field, it should manifest its intention

clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

It is well settled that in enacting the Communications Act of 1934 (47 U.S.C.), Congress did not intend absolute preemption of the field to the exclusion of all state regulation (TV Pix, Inc. v. Taylor, 304 F. Supp. 459 at 464 [D. Nevada, 1968], *affd.* 396 U. S. 556 [1970]).

Moreover, in Head v. New Mexico Board, 374 U. S. 424 (1963), the Supreme Court in discussing preemption under the Communications Act of 1934, stated (at pages 429-430):

"In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act. '[T]he "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case". Statements concerning the "exclusive jurisdiction of Congress" beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.' California v. Zook, 366 U.S. 725, 731. Kelly v. Washington, 302 U.S. 1, 10-13. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot

stand in the same area, [or] evidence of a Congressional design to preempt the field.' Florida Avocado Growers v. Paul, 373 U.S. 132, 134." (Emphasis supplied.)

In TV Pix, Inc. v. Taylor, supra, a three judge court upheld the validity of a state statute which required that, among other things, rates charged by CATV companies be just and reasonable under supervision of the State Public Service Commission. In rejecting the argument that the Communications Act of 1934 precluded the states from acting, the Court held (at page 465):

"...Thus, whether preemption has in fact occurred, invalidating the Nevada Community Antenna Television System Law under the Supremacy Clause of the Constitution, depends on whether the Federal Communications Commission has, in fact, regulated in this area and not upon whether it has the power to do so. The state statute 'at least so long as any power the (Commission) may have remains "dormant and unexercised"', is valid and constitutional." (Citations omitted.)

The authority of the FCC to regulate cable television is not all inclusive, but rather "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting".

(U. S. v. Southwestern Cable Co., 392 U. S. 157 at 178 [1968].)

Consistent with this authority, the FCC may "issue such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as public convenience, interest, or necessity requires". (Id. at 178, quoting 47 U.S.C., § 303[r].)

Subsequently, the Supreme Court upheld the authority of the FCC to promulgate regulations which required in certain instances,

program origination by cable operators (U. S. v. Midwest Video Corp., 406 U. S. 649 [1972]). In upholding the validity of the regulations, the Court (in a plurality opinion by Mr. Justice Brennan), found that "the regulation preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting'". (Id. at 670.)

It is interesting to note that the Supreme Court was sharply divided in U. S. v. Midwest Video, supra, with Chief Justice Burger concurring with the plurality. In his opinion, Chief Justice Burger stated at page 676:

"Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive reexamination of the statutory scheme as it relates to this new development so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."

We submit that the above language indicates that the FCC's regulatory power over pay cable is not as extensive as plaintiffs-appellees or intervenors-plaintiffs-appellees argue.

In both cases (U. S. v. Southwestern Cable Co., supra, and U. S. v. Midwest Video Corp., supra), the regulations which were upheld were related to signal carriage, an area with which the FCC is concerned in the regulation of over-the-air broadcasters. In the case at bar, no relationship exists between the statements

contained in defendants'-appellants' Clarification of Commission Policy and the FCC's concern with the regulation of over-the-air broadcasters and none of the plaintiffs-appellees are engaged in over-the-air broadcasting. Indeed, the rates paid by the citizens of this State is an area not even remotely connected with the FCC's jurisdiction of over-the-air broadcasters. In fact, the rates paid by the citizens of this State is a purely local matter which is more directly related to the State's concern (Executive Law, § 811) than it is to any FCC concern with over-the-air broadcasters. Defendants-appellants submit that the matter of local rates is not "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting". Plaintiffs-appellees made repeated references to over-the-air pay television in the brief and argument below, references which are inapplicable in view of plaintiffs'-appellees' lack of over-the-air broadcast activity.

In January, 1976, the staff of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce presented a staff study to the Subcommittee. In that study, the staff stated, at page 77:

"The federal regulatory role should be confined to those aspects requiring national delineation of standards. Such areas should be defined, and where federal preemption is called for to avoid interference with federal objectives, the logic of preemption should be explicitly stated.

"In all other aspects, cable television regulation should be left to local and state authorities. The federal government

should not try to oversee that process, or become the 'court of last resort' for those seeking redress from local regulation. Specifically, unless the matter comes within the federal domain, the Federal Communications Commission should not attempt to ensure or protect cable television, or the local public, against inappropriate, ineffective or inefficient local regulation."

Moreover, a general review of the staff study with reference to this issue clearly indicates that the staff agreed with preemption by the FCC only in those areas which are related to the FCC's regulation of over-the-air broadcasters. (U. S. v. Southwestern Cable Co., supra; U. S. v. Midwest Video Corp., supra.) At best, a reading of the entire staff study would seem to indicate that the Subcommittee staff does not share the District Court's view that the FCC has preempted the entire field of pay cable regulation.

In TelePrompter Cable Systems, Inc. v. FCC, 543 F. 2d 1379 (D. C. Cir., 1976), the D. C. Circuit Court of Appeals overruled the FCC's decision to refuse operating authority to a cable television system because its franchise had previously been obtained by corrupt means, and it noted (n. 6 at 1383) that "[T]he Commission's authority to adopt the regulatory scheme embodied in the 1972 Rules has not yet been judicially tested. That issue is raised here only tangentially on this appeal however, and consequently we do not reach it."

The FCC's authority to regulate the field of cable television services does not derive from a direct Congressional mandate expressed in the provisions of the Communications Act. To

date, the Act has contained no language which can be relied upon as specific authority for cable television jurisdiction. In fact, the pendency of legislative efforts to create such authority was an apparent basis of the court's action in the Southwestern and Midwest Video decisions, although no such legislation has been forthcoming.

As noted above, the cable television jurisdiction of the FCC has been derived from its more express authority over broadcast services as contained in Title III of the Communications Act of 1934 (47 U.S.C.). However, the FCC's authority over all forms of communications is not unlimited, as demonstrated by the restrictions imposed on "wire" communications services regulation in Title II of the Act. Congress made clear that federal authority over "wire" services extended only to "interstate and foreign commerce in communication by wire and radio" (47 U.S.C. § 151). "Interstate communication" or "interstate transmission" is defined by the Act as follows:

"(e) 'Interstate communication' or 'interstate transmission' means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State,

Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. § 153.

In National Association of Regulatory Utility Commissioners v. FCC, 533 F. 2d 601 (D. C. Cir., 1976) (NARUC), the United States Court of Appeals for the District of Columbia Circuit held that the FCC's purported "preemption of state common carrier regulation over the use of cable system leased access channels for two-way, point-to-point, non-video communications" was not justified in the context of the limitations of Title II of the Communications Act of 1934, as amended. In that decision, the court applied strictly the "ancillary to broadcasting" standard expressed in the Southwestern decision. It concluded that, "[i]t is uncontroverted that the two way communications at issue will be intrastate insofar as they are carried on by a cable network entirely encompassed within a single state. Properly, we think, no contention has been made that all communications within a given cable network take on an interstate character, due to the interstate, broadcast source of many transmissions". [Footnotes omitted.] 533 F. 2d at 610.

The court's opinion in NARUC provides the best clarification of the FCC's cable television authority under the Supreme Court decisions in Southwestern and Midwest Video:

"...the Court's reasoning in both Southwestern and Midwest compels the conclusion that the cable jurisdiction, which they have located primarily in

§ 152(a), is really incidental to, and contingent upon, specifically delegated powers under the Act. The statute's introductory section is made a locus for powers which must of necessity be recognized if the purposes set out in the broadcasting sections are to receive their fullest realization. The Court thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting." 533 F. 2d at 612.

In its basic findings, the court established a more specific standard for review of FCC jurisdiction of cable television:

"The Commission's action before us does not come within its powers reasonably ancillary to broadcasting, which received their greatest judicial recognition in United States v. Midwest Video Corporation. We rest this conclusion (1) upon the absence of factual evidence that a broadcast purpose even indirectly will be served, (2) upon the fact that the controverted activities will be carried on in a competitive common carrier market, and (3) upon the § 152(b) bar to Commission jurisdiction over the intrastate common carrier activities. We note, however, that the binding effect of § 152(b) is substantially intertwined with our finding that, apart from that section, there is no unambiguous support, in either the statutory language or the Supreme Court's opinions, for the action which the Commission has taken.

"As to any projected two-way communications not partaking of the common carrier character, we nonetheless hold, based upon the uncertainty and indirectness of the broadcast purpose allegedly served, that they are not within the Commission's jurisdiction ancillary to broadcasting." 533 F. 2d at 617.

B. THE LIMITS OF CONSTITUTIONAL AUTHORITY.

A serious question of states' rights is involved in this action. The power of the states to review the rates charged its citizens by cable television operators is a fundamental right under the police power reserved to the states by the Tenth Amendment of the United States Constitution. The FCC should not be permitted to abrogate the power of the State of New York without congressional authority to do so in a clear and unambiguous manner. And, as indicated by Chief Justice Burger in U. S. v. Midwest Video, Inc., supra, at page 676, there is a need for "a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts".

The concern expressed by Chief Justice Burger is shared by defendants-appellants and the FCC should not be unilaterally permitted to erode the authority of the states.

The authority of Congress, itself, to legislate and give to the FCC regulatory control over intrastate cable television services is dubious since the Ninth and Tenth Amendments to the U. S. Constitution were intended, in part, to restrict the otherwise broad powers of Congress to regulate commerce. Here defendants-appellants are seeking to regulate pay cable rates charged for a service which is essentially intrastate in nature and which is not broadcast over the air.

POINT II

THE PURPORTED PREEMPTION DOES NOT EXIST;
THE CLARIFICATION ISSUED BY DEFENDANTS-
APPELLANTS DOES NOT CONFLICT WITH ANY
FEDERAL STATUTE, REGULATION OR ORDER.

An analysis of the proceedings which have occurred before the FCC will clearly demonstrate that the FCC has never formally promulgated a regulation which would preclude the states from acting to regulate pay cable rates. Moreover, the Clarification does not, in any way, conflict with FCC statements in this area.

In June, 1970, the FCC issued a Notice of Proposed Rulemaking in Docket No. 18892, 25 F.C.C. 2d 50. In that Notice, the FCC stated (at page 51):

"4. ...We have also acted to impose fairness, equal opportunities, and sponsorship identification requirements. On the other hand, there is also local regulation in this area of CATV origination, so the matter is somewhat a confused, gray area. With respect to choice of the CATV operator on the basis of his character and the nature of his proposal, areas to be served, and services and charges to the public, local authority has been the sole regulating entity." (Emphasis added.)

The FCC's purported preemption of pay cable services can be traced to a letter issued September 8, 1971 (In Re Request by Time-Life Broadcasters, Inc., and Sterling Manhattan Cable Television, Inc., for Interpretive Ruling, FCC 71-946, 31 FCC 2d 747 [1971]). This correspondence addressed only the issue of whether a municipality could prohibit pay cable services, and indicated the FCC's position that municipalities could not. The issue of the

negotiation of subscriber rates was not raised at that time, probably because the FCC did not then concern itself with subscriber rates generally. The prohibition of pay cable services is not at issue in the instant case.

In February, 1972, the FCC released the Cable Television Report and Order in Docket No. 18892, 37 Fed. Reg. 3252. The Court's attention is directed to the fact that at the conclusion of that report (37 Fed. Reg. at 3277), the FCC amended its regulations and terminated the proceedings. Significantly, the amendments (contained in 47 CFR Part 76) to the regulations, make absolutely no reference to preemption in the area of rates for pay cable.* 47 CFR 76.225 regulates pay cable to a degree, but does not make any reference to rates or to the total preemption of pay cable by the FCC.

In April, 1975, the FCC issued a further statement in, In the matter of Part 76, Subpart G, of the Commission's rules and regulations pertaining to the cablecasting of programs for which a per-program or per channel charge is made, Docket No. 19554, 40 Fed. Reg. 15546. Again, the FCC discussed the regulation of pay

*It is interesting to note that the FCC cable television rules adopted in 1972 contained a requirement that: "(4) The franchising authority has specified or approved the initial rates that the franchisee charges subscribers for installation of equipment and regular subscriber services. No increases in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process." 47 C.F.R. § 76.31(a)(4). In deleting this section from its rules in September, 1976, the FCC expressly rejected suggestions that it prohibit all municipal rate negotiations. Order in Docket No. 20681, effective September 23, 1976. 41 CFR 34963.

cable by the states (id., at 15571, paragraphs 216, 217), but again no regulations were promulgated (id., at 15571, et seq.). The programming regulations which were adopted in that proceeding were subsequently invalidated by the District of Columbia Court of Appeals. (Home Box Office, Inc., et al. v. FCC, et ano., [D. C. Cir., decided March 25, 1977, No. 75-1280 et al.; 40 Pike & Fisher, Radio Regulations (RR 2d) 283] ____ F. 2d ____.)

In August, 1975, the FCC issued a Report and Order Terminating Proceeding, in Docket No. 20272, 40 Fed. Reg. 34608. In that Report (id., at 34611), the FCC stated:

"24. The subject areas this agency has preempted include, of course, signal carriage, pay cable, leased channel regulations, technical standards, access, and several aspects of franchisee responsibility. In each of these areas enforceable proposals or agreements contrary to the federal rules are ultra vires and of no force or effect absent a waiver of the rule by this agency. Non-federal officials have responsibility for the non-operational aspects of cable franchising including bonding agreements, maintenance of rights-of-way, franchisee selection and conditions of occupancy and construction (within broad federal guidelines as to the latter two points)."
(Emphasis supplied.)

Again, the FCC terminated the proceeding without promulgating any regulation regarding pay cable rates (id., at 34613).

Apparently, the FCC thinks it has effected some form of preemption of pay cable rates. Although the FCC, itself, may argue that it intended to preempt this area, such a preemption was never accomplished. By never issuing any regulation or order expressly

effectuating such a preemption, the FCC denied any interested parties the opportunity to challenge such an action.

Finally, in April, 1976, the FCC issued an Inquiry into Regular Subscriber Rates, 41 Fed. Reg. 14929. The Inquiry invited comments on or before June 7, 1976, but again did not amend any FCC regulations (47 CFR) concerning pay cable rates.

An analysis of the various statements of the FCC, therefore, leads to the inescapable conclusion that, at the present time, there is no Federal regulation to preclude defendants-appellants from issuing the Clarification which is challenged in this action. Nor has the FCC issued any order which would expressly prohibit the negotiation of pay cable subscriber rates.

An FCC preemption of the type alleged by plaintiffs-appellees would be wholly inconsistent with the entire nature of the FCC's cable television rules (47 CFR Part 76). In adopting its current regulatory scheme for cable television services in 1972 (and, for that matter, in adopting its preexisting cable television rules, at its former section 74.1101, et seq.), the FCC imposed its jurisdiction by mandating that cable television systems would not be permitted to operate unless they demonstrated compliance with a variety of specified affirmative standards. A cable television system's inability to meet such standards, be they related to signal carriage, technical performance or franchise provisions, resulted in a denial of operating authority. The FCC, itself, has never claimed the authority to mandate municipal action in order to enable a franchised cable television system to meet the FCC's required

franchise standards and receive operational authorization. In this regard, note that the FCC's cable television rules provide, in part, as follows:

"Certificate of compliance required.
 (a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission [FCC]....
 47 CFR § 76.11.

* * *

"Filing of applications....
 (a) For a cable television system not operational prior to March 1, 1972..., an application for certificate of compliance shall include:

* * *

"(3) A copy of the franchise, license, permit, or certificate granted to construct and operate a cable television system;.... 47 CFR § 76.13.

* * *

"Franchise standards. (a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:"
 47 CFR § 76.31.

The previously referenced cases adjudicating the FCC's authority to regulate cable television services (e.g., U. S. v. Southwestern Cable Co., supra, and U. S. v. Midwest Video Corp., supra) arose from challenges to the FCC's authority by parties within the cable television industry. In the Southwestern case, a cable television system challenged the FCC's authority to limit its carriage of television broadcast signals (pursuant to the FCC's

former rules, 47 CFR § 74.1107). In the Midwest Video case, a cable television system challenged the FCC's authority to deny it operating rights if it did not comply with newly adopted program origination requirements (as provided in a former rule, 47 CFR § 74.1111[a]). In both cases the Supreme Court upheld the FCC's authority to make compliance with its rules a condition of the cable television system's authority to operate. No court has ruled that the FCC may force a municipality to act in a particular fashion in order to ensure that a cable television system could operate. This would be tantamount to the creation of a system of federal franchising.

One additional development relating to the extent of the FCC's alleged preemption should be mentioned. On December 9, 1976, the FCC issued a Proposed Rule Making in the Matter of Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships, Docket No. 21002; RM-2695, RM-2723; FCC 76-1070; 41 FR 54506. In this proceeding the FCC threw open all aspects of section 76.31 of its Rules and requested comments on any and all forms of modifying its standards for cable television franchises. The FCC once again reviewed the history and original purpose of its involvement in the franchise relationships of cable television operators and municipal governments. It noted the procedural difficulties and substantive inequities that have resulted from its policies as the field of cable television developed in new directions. It acknowledged the limitations of its own authority to control franchise provisions. For example, in discussing the import of its 1974 Clarification, supra, it noted

(paragraph 22) as follows:

"We did not say-indeed we have no authority to declare-that the happening of some event, such as amendment, would terminate the franchise. Moreover, while any effect of our certification process on that franchise document is properly a matter of local law, we did not contemplate...that amendments...should 'reopen' the entire franchise."

Among other options, the FCC is specifically considering the total elimination of its franchise standards. Comments in this proceeding were due March 1, 1977. The FCC indicated (paragraph 36) that it expected to complete that proceeding no later than June 30, 1977. That proceeding alone should provide a basis for determining the absence of a clear federal preemption to preclude defendants-appellants from regulating pay cable rates for services which are not broadcast over the air.

Absent a conflict between the Clarification and the statements, it would be improper to invalidate the Clarification.

"A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." (Citations omitted.) Florida Lime & Avocado Growers, Inc. v. Paul, 373 U. S. 132, 142-143 (1963).

Since there is no conflict and since compliance with both the FCC statements and the Clarification is not an impossibility, defendants-appellants' actions are proper and are not preempted by the FCC statements.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD
BE REVERSED.

Dated: October 21, 1977

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Brookhaven Cable TV Inc., et al.,
Plaintiffs-Appellees,

-against-

Robert F. Kelly, et al.,
Defendants-Appellants.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Beverly J. Smith, being duly sworn, says:

I am over eighteen years of age and a typist
in the office of the Attorney General of the State of New York, attorney
for the defendants-appellants herein.

On the 25th day of October 1977 I served
the annexed Joint Appendix and brief upon the
attorneys named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
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RALPH D. CAMARDO
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Qualified in Albany County
Commission Expires March 30, 1979

Beverly J. Smith